

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0572
Sales Tax
Responsible Officer
For the Years 1999-September 30, 2000**

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ISSUES

1. Sales Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan, 654 N.E.2nd 270 (Ind. 1995), Slodov v. United States, 463 U.S. 238 (1978).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes

2. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b).

The taxpayer protests the assessment of penalty.

STATEMENT OF FACTS

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales taxes for the tax period 1999 through September 30, 2000 against the taxpayer as responsible officer of a corporation. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

1. Sales Tax-Responsible Officer Liability

Discussion

The taxpayer purchased a 49 % interest in the corporation on August 17, 1990 as an investment. Although he was a director, the taxpayer was not involved in the day-to-day operations of the corporation. The other shareholder, as President and Secretary of the

corporation, operated the corporation. Sometime during 2000, the taxpayer discovered that the other director had mismanaged the corporation and commingled corporate funds with his own personal funds and that the corporation was insolvent. On October 26, 2000, the taxpayer purchased the other director's interest in the corporation. At this time the taxpayer became responsible for the day to day operations of the corporation. The corporation collected but failed to remit sales taxes during the tax period January 1, 1999 through September 30, 2000. The corporation properly remitted all sales taxes collected after the tax period ending September 30, 2000.

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind. 1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

The taxpayer argues that although he was the person with the duty to remit the sales taxes to Indiana after October 26, 2000, he was not the person with the duty to remit the sales taxes to Indiana during the tax periods when the taxes were not properly remitted.

Therefore, he argues that he is not personally responsible for the trust taxes that were not remitted prior to the time he became the responsible officer.

This argument is not persuasive. As the responsible officer after October 26, 2000, the taxpayer is deemed to have known that the trust taxes had not been properly remitted. As the person who made the fiscal decisions for the corporation, he determined which obligations to pay and which obligations to not pay. He chose not to remit the trust taxes due to Indiana during the period when he operated the corporation. Therefore he had the duty to remit those taxes and is personally responsible for those sales taxes not remitted to the state.

Alternatively, the taxpayer contends that he should only be held personally responsible to the extent that the corporation actually had funds at the time he became the responsible officer on October 26, 2000. The taxpayer bases this contention on the United States Supreme Court finding in Slodov v. United States, 463 U.S. 238 (1978). In that case, Dr. Slodov purchased the stock in a corporation whose previous owners had dissipated the corporate assets without remitting employee withholding trust taxes. The IRS brought an action to recover the trust taxes from Dr. Slodov personally. The United States Supreme Court held that Dr. Slodov could be held personally responsible only to the extent that the corporation had funds at the time it was purchased by Dr. Slodov. Similarly, in the instant case, the previous owner and manager of the corporation dissipated corporate funds and did not remit trust taxes. The taxpayer should only be held personally responsible for the payment of the trust taxes to the extent the corporation had funds available to pay the taxes when the taxpayer gained control. The taxpayer presented substantial evidence that the corporation had \$12,249.21 in its accounts on the date of transfer of the corporation. Therefore, the taxpayer is personally responsible for remitting \$12,249.21.

Finding

The taxpayer's protest is sustained to the extent the assessment exceeds \$12,249.21.

2. Tax Administration-Penalty

Discussion

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is

treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer presented adequate evidence to sustain his burden of proof that he was not negligent in his failure to remit the assessed taxes.

Finding

The taxpayer's protest is sustained.